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# **A New Sort of Duty? The Significance of “Outcome” Duties in the Climate Change and Child Poverty Acts**

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Statutory duties on Ministers and other public authorities are not new but have been becoming increasingly common in recent years, with a general trend towards the imposition of stronger obligations. The purpose of this article is to examine the appearance of what appears to be a new form of duty, imposed on Ministers under the climate change legislation and also making an appearance in relation to child poverty. It is argued that the main duties under that legislation represent an innovation in the form of an “outcome” duty, a duty not just to do something but to ensure the achievement of a specified outcome which depends on the cumulative conduct of a wide range of parties. Such duties make new demands on public authorities, different from those imposed by the sorts of duties that have previously been used, and setting new challenges in terms of enforcement. They are, however, not wholly unfamiliar, sharing features with obligations imposed on the state as a whole under some elements of EU law. Closer analysis suggests that even if their innovative content is recognised, such duties may not be amenable to direct judicial enforcement, but this in turn raises questions over their nature, status and impact.

For simplicity and brevity, the bulk of the analysis here concentrates on the climate change legislation. The same arguments apply to the duty on the Secretary of State to ensure that the child poverty targets are met by 2020,<sup>1</sup> and any significant differences are noted before the consequences of having different outcomes to achieve are considered at the end of the paper.

## **“Outcome” Duties**

The Climate Change Act 2008 and the Climate Change (Scotland) Act 2009 impose duties of many sorts on Ministers and other public authorities. Most of these fall within the categories of duties which are familiar from other legislation,<sup>2</sup> as can be illustrated by taking examples from the Scottish Act. This is not the place for a full taxonomy of statutory duties imposed on public authorities, but the existing types of duty can be roughly grouped into the following, sometimes overlapping, categories:

- “operational” duties require authorities to carry out specific tasks,<sup>3</sup> and here include the obligations on the Scottish Ministers to produce land use and public participation strategies;<sup>4</sup>

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<sup>1</sup> Child Poverty Act 2010, s.2.

<sup>2</sup> The examples given below are drawn from environmental law, but similar examples can be found in any other area where statutory intervention has created a role for Ministers and public authorities, e.g. 10 of the first 15 sections of the Communications Act 2003 (as initially enacted) concern duties.

<sup>3</sup> E.g. the duty on local authorities to inspect their area for contaminated land, to give notice when such land is found, to serve notices requiring the remediation of such sites and to maintain a register of these (Environmental Protection Act 1990, ss.78B, 78E and 78R).

- “procedural” duties set out the procedure which must be followed to achieve certain tasks,<sup>5</sup> and here include the consultation requirements prior to the publication of the land use strategy;<sup>6</sup>
- “relationship” duties establish the relationship between different authorities by requiring consultation<sup>7</sup> or establishing a hierarchy in terms of reporting,<sup>8</sup> guidance<sup>9</sup> or directions,<sup>10</sup> and here include the many obligations on Ministers to report to the Parliament and provide guidance to public bodies;<sup>11</sup>
- “have regard” duties require authorities to have regard to certain things in the exercise of their functions (but not to go beyond that to give them overriding weight)<sup>12</sup> and here include the obligations on Ministers to have regard to certain criteria in setting annual targets and on public authorities to have regard to ministerial guidance in relation to their climate change duties;<sup>13</sup>
- “purposive” duties set out the general objective to be pursued in carrying out a task<sup>14</sup> or by an authority as a whole<sup>15</sup> and here include the obligation on Ministers and public bodies to exercise functions “in a manner which encourages equal opportunities”;<sup>16</sup>
- “endeavour” duties<sup>17</sup> go beyond setting out a broad purpose by requiring authorities to do certain things, but what is required is very broadly defined<sup>18</sup> and often subject to

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<sup>4</sup> Climate Change (Scotland) Act 2009, ss.57, 91.

<sup>5</sup> E.g. the obligations to notify owners, occupiers (and in Scotland significant others) when an SSSI is designated and the consultation and notification requirements imposed on public bodies in relation to activities that are likely to damage the natural features of an SSSI (Wildlife and Countryside Act 1981, ss.28, 28G-28I; Nature Conservation (Scotland) Act 2004, ss.3, 12-15, 48(2)).

<sup>6</sup> Climate Change (Scotland) Act 2009, s.57(4)-(5).

<sup>7</sup> E.g. consultation between local authorities and the environment agencies in relation to contaminated land (Environmental Protection Act 1990, s.78C).

<sup>8</sup> E.g. the obligations on the environmental and nature conservation agencies to report through Ministers to Parliament (Environmental Protection Act 1990, Sched.6 paras 19-21; Natural Heritage (Scotland) Act 1991, s.10; Environment Act 1995, s.45; Natural Environment and Countryside Act 2006, Sched.1 paras.23-25, Sched.4 para.18).

<sup>9</sup> E.g. local authorities must follow Ministerial guidance on contaminated land (Environmental Protection Act 1990, s.78A(2)).

<sup>10</sup> E.g. the Environment Agency and the Scottish Environment Protection Agency (SEPA) must follow Ministerial directions (Environment Act 1995, s.40).

<sup>11</sup> Climate Change (Scotland) Act 2009, ss.33-43, 45.

<sup>12</sup> E.g. the duties on Ministers, government departments and public bodies to “have regard to the desirability” of conserving the natural heritage etc. (Countryside (Scotland) Act 1967, s.66; Countryside Act 1968, s.11) and the many obligations to have regard to sustainable development; A. Ross, “Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in UK and Scottish Statutes” (2008) 20 JEL 35.

<sup>13</sup> Climate Change (Scotland) Act 2009, ss.4(3)-(4), 45

<sup>14</sup> E.g. the purpose set out for the exercise of the pollution control powers of the Environment Agency and SEPA (Environment Act 1995, ss.5, 33).

<sup>15</sup> E.g. the general aims and purposes set out for Scottish Natural Heritage (Natural Heritage (Scotland) Act 1991, s.1(1)).

<sup>16</sup> Climate Change (Scotland) Act 2009, s.93.

<sup>17</sup> Duties of this sort have previously been referred to as “exhortatory or target duties” (*Kent v Griffiths* [2001] QB 36 at 51, Woolf LJ), but the current phrase seems clearer in order to distinguish between “targets” which must be achieved and those which must simply be worked towards.

<sup>18</sup> E.g. the duty on the environment agencies to “follow developments in technology and techniques for preventing or minimising, or remedying or mitigating the effects or, pollution of the environment,” where no simple pass/fail test that can be applied to check whether there has been compliance (Environment Act 1995, ss.5(4), 33(4)).

significant qualifications,<sup>19</sup> and here these include the obligation “so far as reasonably practicable” to ensure a high standard of energy performance in government buildings.<sup>20</sup> Such duties may demand that authorities do certain things themselves or set out broad objectives, but they do not require that certain outcomes are achieved.<sup>21</sup>

What stands out in the climate change legislation, though, is the very different nature of the key duties that are imposed in relation to the targets for reducing the volume of greenhouse gas emissions. These simply require Ministers to ensure that the relevant targets are met.<sup>22</sup>

It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline.<sup>23</sup>

The Scottish Ministers must ensure that the net Scottish emissions account for the year 2050 is at least 80% lower than the baseline.<sup>24</sup>

A similar formulation appears in the Child Poverty Act 2010 in relation to the targets to reduce child poverty by 2020.<sup>25</sup> These are not duties requiring the Ministers just to do specific acts, to develop plans for achieving the specified goals, to have regard to certain considerations or even to endeavour to bring something about. Instead, on the face of it they are absolute obligations to ensure that a certain outcome is achieved, an outcome that lies beyond the scope of matters that are currently (or in any foreseeable future) completely within the direct control of the ministers,<sup>26</sup> but rather requires a complex aggregation of legal, financial, policy and practical measures taken by government and others over a prolonged period. There are none of the usual qualifications about doing only what is reasonable or practicable, or pursuing the goal only so far as consistent with other functions. What the Acts appear to create is a duty to achieve the outcome – full stop. Anything short of achieving that will amount to a breach of that duty. Such legislation, embodying goals as legally binding targets, clearly makes a political statement, but what about its legal impact?

In attempting to answer that question, one parallel worth considering is that offered by EU legislation in similar terms. It is not uncommon for EU Directives to set out what the Member States must achieve, requiring that Member States ensure that the specified standard or target be met, not just that they take reasonable steps towards it. Environmental law is full of examples that the terms of the Climate Change Acts follow in requiring targets to be met

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<sup>19</sup> E.g. the obligation on public authorities in England and Wales to “take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the ... features by reason of which” an SSSI has been designated (Wildlife and Countryside Act 1981, s.28G).

<sup>20</sup> Climate Change (Scotland) Act 2009, s.75(1).

<sup>21</sup> Note that any duties must be carefully examined to identify exactly what they require. The Green Energy (Definition and Promotion) Act 2009 requires the Secretary of State to amend the planning rules so as to provide automatic permission for certain forms of microgeneration on residential land (s.3), but the duty is just to put in place an enabling power, and says nothing about the actual detailed content of what will qualify for such permission, whilst the requirement that the Secretary of State “must consider” similar changes for non-residential land (s.4) is similarly converted into a simple operational duty by specifying that the outcome of the consideration is simply a report to Parliament.

<sup>22</sup> Similar duties apply in relation to the interim targets for 2020: Climate Change Act 2008, s.5(1); Climate Change (Scotland) Act 2009, s.2.

<sup>23</sup> Climate Change Act 2008, s.1(1).

<sup>24</sup> Climate Change (Scotland) Act 2009, s.1(1).

<sup>25</sup> Child Poverty Act 2010, s.2(1): “It is the duty of the Secretary of State to ensure that the following targets are met in relation to the United Kingdom in relation to the target year ...”

<sup>26</sup> For other long-term policy goals any legal obligation may relate only to things that are wholly within ministerial control, e.g. the legal duty that may flow from the promise in the current Government's coalition agreement, “to honour our commitment to spend 0.7% of GNI on overseas aid from 2013, and to enshrine this commitment in law”; *The Coalition: our programme for government* (2010, Cabinet Office), p.22.

by a specified date, not only in relation to greenhouse gas emissions themselves<sup>27</sup> and the proportion of energy to be derived from renewable sources,<sup>28</sup> but also in other areas such as the proportion of packaging that is to be recovered or recycled<sup>29</sup> and the quantity of municipal biodegradable waste being disposed to landfill.<sup>30</sup> Failure to achieve the specified outcome is a breach of EU law.

Such duties are treated as absolute, despite the many arguments that Member States have tried to advance in order to avoid a finding of non-compliance.<sup>31</sup> The view of the European Court of Justice was clearly stated in a case where the United Kingdom produced several arguments why it should not be held in breach of its obligations under the Bathing Water Directive despite the fact that the water quality at a number of sites did not meet the required standard:

The only derogations from the obligation incumbent upon Member States to bring their bathing waters into conformity with the requirements of the directive are those provided for in Articles 4(3), 5(2) and 8, whose provisions are summarized above. It follows that the directive requires the Member States to take steps to ensure that certain results are attained, and, apart from those derogations, they cannot rely on particular circumstances to justify a failure to fulfil that obligation.<sup>32</sup>

The obligation on the state is thus to achieve the outcome specified, unless any failings are covered by the derogations or exceptions expressly provided. There is thus a precedent for treating “outcome” duties as meaning what they say and requiring that the specified result be achieved.

In the context of EU obligations, the approach taken by the Court of Justice creates a mismatch between the obligations under EU law and the domestic mechanisms for achieving them, since the tasks of public authorities in the UK have traditionally been based on powers rather than duties to achieve certain outcomes. One way of reconciling these has been to impose general duties on authorities to exercise their powers so as to secure compliance with the EU requirements. Thus in relation to both nature conservation and water, authorities are required “to exercise their functions under [specified] enactments so as to secure compliance with the requirements of” the specified Directive.<sup>33</sup> These are in one sense similar to the “outcome” duties being discussed since they focus on the outcome that is to be achieved, in this case compliance with EU requirements. But there is a crucial difference. These duties are limited in that they instruct the authorities on how they are to exercise their own, separately created, functions. To the extent that non-compliance with the requirements of the relevant Directive is the result of other

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<sup>27</sup> Decision No 406/2009/EC, for the UK requiring a reduction by 2020 of 16% against the baseline in 2005.

<sup>28</sup> Directive 2009/28/EC, art.3.

<sup>29</sup> Directive 94/62/EC, art.6.

<sup>30</sup> Directive 1999/31/EC, art.5; like to Climate Change Acts this requires a reduction measured by the percentage reduction from an earlier baseline figure, here set at 1995.

<sup>31</sup> M. Hedemann-Robinson, *Enforcement of European Environmental Law: Legal Issue and Challenges* (2007, Routledge Cavendish) 89-104.

<sup>32</sup> *Commission v United Kingdom* (C-56/90) [1993] ECR I-4109 at para.43, considering Directive 76/160/EEC.

<sup>33</sup> For nature conservation, Conservation (Natural Habitats, &c.) Regulations 1994, SI 1994/2716, reg.3 and Conservation of Habitats and Species Regulations 2010, SI 2010/490 relating to the Habitats and Species Directive 92/43/EEC; for water, Water Environment and Water Services (Scotland) Act 2003, s.2(1), 2(2) and Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242, reg.3, relating to the Water Framework Directive 2000/60/EC.

causes, then failure to achieve that outcome does not entail a failure to comply with the duty imposed by domestic law.<sup>34</sup> By contrast, the duties under the Climate Change Acts are simply to achieve the outcome, so that any failure does amount to a breach of the legal duty. On the face of it, Ministers are responsible not just for doing what they can to achieve the target, but simply for ensuring that it is reached.

## Enforcement

The question arises, though, of what does it mean to say that the Ministers are “responsible”? What are the consequences of a failure to achieve the outcome set?<sup>35</sup> This issue has already been given some consideration in relation to other forms of duty,<sup>36</sup> but the distinctive nature of the “outcome” duties raises new challenges. Even where duties are much narrower and are owed not to the public at large but to specific individuals, e.g. the homeless,<sup>37</sup> the UK courts have been reluctant to recognise them as imposing absolute obligations to produce certain results and it may seem absurd to suggest that the Parliaments have imposed on Ministers an absolute duty to ensure that something over which they have far from total control will happen. One response is to read the climate change duties as qualified in some ways rather than as bluntly requiring the achievement of the targets, thereby precluding any direct judicial enforcement. Yet this can be argued to give too little weight to the deliberate formulation of the duties. Different paths have to be explored, and even if they do lead to the same conclusion that the duties are unlikely to be amenable to direct enforcement through the courts, they raise further questions about the nature and purpose of the obligations that have been created. The content of the duty will be looked at first and then other issues that would arise in trying to invoke judicial intervention.

### The Content of the Duty

Whereas it is clear that specific operational and procedural duties of the kind noted above can be enforced by the courts, it is generally accepted that other sorts of duties are not necessarily amenable to direct judicial enforcement.

“Parliament has become fond of imposing duties of a kind which, since they are of a general and indefinite character, are perhaps to be considered as political duties rather than as legal duties which a court could enforce. ... Only in the unlikely event of its making total default would [an authority] be at risk

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<sup>34</sup> Although given the breadth of ministerial powers, particularly the little-used but potentially far-reaching direction and default powers in relation to other authorities and the compulsory purchase or intervention powers over private enterprises, there may be arguments over whether taking a more radical view of how functions should be exercised might have avoided falling short of the outcome.

<sup>35</sup> It should be noted that there are mechanisms within the Acts to alter the targets, which might be activated to adjust the targets to what is being achieved in practice rather than the targets shaping what has to be done; Climate Change Act 2008, ss.2-3; Climate Change (Scotland) Act 2009, s.2. The Scottish power does not apply to the 2050 target and the English one has already been exercised to raise the 2020 target; Climate Change Act 2008 (2020 Target, Credit Limit and Definitions) Order 2009, SI 2009/1258, art.2.

<sup>36</sup> See generally C. Callaghan, “What is a ‘Target Duty’?” [2000] *Jud Rev* 184; S. Hendry, “Worth the paper that it’s written on? An analysis of statutory duty in modern environmental law” [2005] *J.P.L.* 1145; C.T. Reid and I.R. Roberts, “Nature Conservation Duties: More appearance than substance” (2005) 17 *E.L.M.* 162, pp.166–168; A. Ross, “Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in UK and Scottish Statutes” (2008) 20 *J.E.L.* 35, pp.60–65.

<sup>37</sup> *O'Rourke v Camden Council* [1998] AC 188.

of legal compulsion in respect of its general duties. But as soon as duties become sufficiently specific, the courts do not shrink from enforcing them.”<sup>38</sup> The climate change duties can be seen as political duties of the sort mentioned there, a view reinforced by the explicit description of the reductions as “targets”.

“It may be said that that the duty in cl.1(1) [now s.1(1) of the Climate Change Act 2008], while owed to no one in particular, is sufficiently specific to be enforced. However, although cl.1(1) does specify precisely the reduction in the carbon account the Secretary of State is to ensure, it is plain that this reduction is a target. It is called that in the marginal note, in the heading and in the preamble. A target is something that one aims to achieve . . . but no one can guarantee a bull’s eye. Inherent in the idea of a target is an aspiration not a guarantee of achievement. At most then this clause can be interpreted as requiring the Secretary of State to use his or her best endeavours to achieve the target. This has the consequence that a failure to achieve the target does not necessarily imply a breach of the duty.”<sup>39</sup> Thus, the annotation to section 1 of the Climate Change Act 2008 on Westlaw notes that achieving the emissions target may depend on matters outside the Minister’s control and then asserts:

“The duty therefore has to be read as a duty to take reasonable steps, in the exercise of the Secretary of State’s existing functions and by new kinds of action reasonably within what would normally be expected of a Government department, towards ensuring that the target is met.”

Such an approach is in line with the courts’ general desire to avoid becoming embroiled in areas where they are asked to judge on issues which inevitably involve wide-ranging arguments over policy preferences, the allocation of resources and the merits of particular action or inaction in a world of long-term uncertainty.<sup>40</sup> Yet it can be argued that this does not give sufficient weight to the specific formulation of the climate change and child poverty duties. In comparison with the formulations used in other statutes it is the precision of what is to be achieved and the very absence of words limiting the duty either to what it is reasonable or practicable to achieve or to the actions of the Ministers themselves which are most striking. The duty is not phrased as an “endeavour” duty and it can be argued that this distinction should be given legal weight, especially since interpreting the duty in a more absolute sense may actually help the courts to avoid being faced with difficult “political” decisions.

There are two ways in which the difference between “endeavour” and “outcome” duties is most noted. The first is that for “outcome” duties there are no qualifiers as to what must be achieved, there is no “degree of elasticity”.<sup>41</sup> Such elasticity can arise either because of what is explicitly required or because what is required is not susceptible to precise assessment, either in itself or because of the presence of competing requirements. Explicit qualifications include where authorities are required to “take reasonable steps”<sup>42</sup> or “such

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<sup>38</sup> H.W.R. Wade & C.F. Forsyth, *Administrative Law* (10<sup>th</sup> ed.) (2009, OUP) 498.

<sup>39</sup> Memorandum from Prof. Christopher Forsyth (CCB 92) to the Joint Committee on the Draft Climate Change Bill (2006-07, HL 170-II/HC 542-II, Ev.238).

<sup>40</sup> E. Palmer, “The Child Poverty Act 2010: holding government to account for promises in a recessionary climate?” (2010) 3 EHRLR 305, at 310-313; M. Stallworthy, “Legislating against Climate Change: A UK Perspective on a Sisyphean Challenge” (2009) 72 MLR 412 at 423-427.

<sup>41</sup> Woolf LJ in *R v Inner London Education Authority, ex parte Ali* (1990) 2 Admin LR 822.

<sup>42</sup> Wildlife and Countryside Act 1918, s.28G; for authorities in Scotland the wording of the duty is very slightly different (Nature Conservation (Scotland) Act 2004, s.12).

steps as appear to be reasonably practicable”,<sup>43</sup> or to act “to such extent as [they] consider desirable”.<sup>44</sup> Inherent lack of precision arises when the goal that is set is not precisely measurable, such as the “purposive” duty of “preventing or minimising, or remedying or mitigating the effects of, pollution of the environment,”<sup>45</sup> or in different contexts the duty of providing “sufficient” schools<sup>46</sup> or to “maintain” a road.<sup>47</sup> The presence of duties to pursue competing interests may again mean that the legislation does not exactly specify what outcome must be achieved, whether as a result of a body being required to strive for an objective only “so far as may be consistent with the proper discharge of its functions” or of a range of objectives being set without specifying the precise balance between them.<sup>48</sup>

The second difference is that the obligation is not defined in terms of the efforts of the Ministers themselves, but based on the achievement of the outcome. The most obvious contrast is where a broad duty has been imposed as a means of seeking to secure compliance with EU requirements. EU law may impose an obligation on the state to achieve an outcome, but the domestic legislation has merely required Ministers and other public bodies “to exercise their functions under [specified] enactments so as to secure compliance with the requirements of” the relevant Directive.<sup>49</sup> Such phrasing is very different and clearly more limited than the climate change duty to “ensure” a certain level of emissions. The former affects only the way in which existing powers and functions are exercised; the latter is not so restricted.

It is also notable that other weaker forms of obligation have been avoided.<sup>50</sup> A common device is not actually to require that an outcome is achieved but to require that certain things are done, which may help toward that outcome. The Climate Change (Scotland) Act 2009 itself contains many duties of this sort, requiring the Ministers to produce among other things a land use strategy, an energy efficiency plan, a plan for promoting renewable heat and a strategy for public engagement.<sup>51</sup> Since the legal obligations are purely in relation to the production of the plan or strategy, not its content or implementation, the courts can make a clear determination of whether or not the duty has been fulfilled, without any risk of becoming entangled in any political debates over what is the right thing to do.

Such issues were explored in *R (Friends of the Earth) v Secretary of State for Business, Enterprise and Regulatory Reform*<sup>52</sup> where the Court of Appeal held that statutory provisions in relation to fuel poverty<sup>53</sup> required the production of a strategy but that the government could not be held legally to account for failing to achieve the target set in that

<sup>43</sup> Natural Environment and Rural Communities Act 2006, ss.41,42.

<sup>44</sup> Environment Act 1995, ss.6, 34

<sup>45</sup> Environment Act 1995, s.5; the same purpose is stated for SEPA, *ibid.*, s.33.

<sup>46</sup> Education Act 1944, s.8, as considered in *R v Inner London Education Authority, ex parte Ali* (1990) 2 Admin LR 822 (now Education Act 1996, s.14).

<sup>47</sup> *Haydon v Kent County Council* [1978] QB 343.

<sup>48</sup> Both features of the Forestry Act 1967, s.1(3A).

<sup>49</sup> Note 33, above.

<sup>50</sup> There is a contrast between duties relating to the child poverty targets for 2020, which must be achieved, and for 2010, which must be the subject of reports; Child Poverty Act 2010, ss.1-2. Similarly the climate change legislation establishes only two targets as legally binding, for 2020 and 2050, with the other targets and budgets the subject of reporting duties only.

<sup>51</sup> Climate Change (Scotland) Act 2009, ss. 57, 60, 61, 91.

<sup>52</sup> *R (Friends of the Earth) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] EWCA Civ 810.

<sup>53</sup> Warm Homes and Energy Conservation Act 2000, s.2.



strategy. The obligation was rather to endeavour to meet the target and to do so “as far as reasonably practicable”.<sup>54</sup> In particular, it was said that in assessing practicability regard was to be had to the resources available to the relevant department, rather than requiring the allocation of public revenues to be altered to give absolute priority to meeting the stated goal.

Where the legislation identifies the steps towards an objective, a similar approach has been shown by the European Court of Justice. In *Janecek v Freistaat Bayern*<sup>55</sup> it was held that an individual resident did have the right to require city authorities to prepare an action plan to deal with locally poor air quality,<sup>56</sup> but that the authorities had discretion over its content – it did not have to guarantee absolute compliance with the requisite standards of air quality, so long as it was capable of producing a return to compliance. The “operational” duty was enforceable by individual residents, whereas they could not insist on the specific outcome from the process. At the appropriate time, though, the EU itself could hold the state responsible for failing to achieve any goals that had been clearly set.

Going beyond such a procedural approach would take the UK courts into territory where they have always felt uncomfortable, setting priorities for government action in a way which they have been extremely keen to avoid.<sup>57</sup> Requiring Ministers to produce reports or strategies or to have regard to certain considerations in deciding what to do is one thing; requiring them actually to achieve certain goals is another, especially when meeting those goals involves much more than simply doing certain things themselves, but rather operating all the levers and drivers of government to co-ordinate action across society and the economy as a whole. In particular, the courts have shied away from getting involved in decisions that affect the allocation of public resources. Of course, almost every decision has some effect on resources, but in several cases, notably ones about healthcare, the courts have insisted that the “[d]ifficult and agonising judgment ... as to how a limited budget is best allocated ... is not a judgment which a court can make.”<sup>58</sup> In the *Friends of the Earth* case the court accepted that in the face of limited public finances it would be “constitutionally startling” for the court to order that certain objectives be prioritised within government “bypass[ing] the long-established constitutional processes and controls in respect of public expenditure.”<sup>59</sup> Yet the climate change legislation does seem to set such a priority for government and to give it status as a legal duty to be fulfilled. It is suggested in the *Friends of the Earth* case that setting priorities for government might be required by the use of “clear and unambiguous language”,<sup>60</sup> and that is exactly what the simple wording of the climate change duties seems to provide. There is at least an arguable case that the main duties under the climate change legislation thus break new ground by imposing an unqualified requirement on Ministers to achieve a particular outcome.<sup>61</sup>

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<sup>54</sup> Warm Homes and Energy Conservation Act 2000, s.2(1).

<sup>55</sup> *Janecek v Freistaat Bayern* (C-237/07) [2008] ECR-I 6221.

<sup>56</sup> Under Directive 96/62/EC.

<sup>57</sup> See, for example, the explicit disavowal by Holman J of any role for the courts in “macro-economic” and “macro-political” decisions in *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 Admin at [17], [48], [58] and [62].

<sup>58</sup> *R v Cambridge Health Authority, ex p B* [1995] 1 W.L.R. 898 (Bingham MR at 906); see R. James and D. Longley, “Judicial Review and Tragic Choices: *Ex p B*” [1995] PL 367; J. King, “The Justiciability of Resource Allocation” (2007) 70 MLR 197.

<sup>59</sup> *R (Friends of the Earth) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] EWCA Civ 810, [2010] Env LR 11, at [46].

<sup>60</sup> *R (Friends of the Earth) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] EWCA Civ 810, [2010] Env LR 11, at [46].

<sup>61</sup> On the similar duty under the Child Poverty Act 2010, see E. Palmer, “The Child Poverty Act 2010: holding government to account for promises in a recessionary climate?” (2010) 3 EHRLR 305, esp. at 313-314.

## Judicial Intervention

If we take the wording of this duty seriously, what then about enforcement? Turning to the courts, judicial review is the only realistic route for seeking a sanction or remedy.<sup>62</sup> The likelihood of any individual being able to claim compensation is ruled out by the combination of the unlimited class to whom the duty is owed<sup>63</sup> and the difficulty of attributing any loss to the failure to achieve the targets. In invoking the courts' intervention, a number of hurdles arise. The end result may be that the courts will not be able to enforce the duty, but the recognition of the different qualities of "outcome" duties may still have further ramifications.

### a) Standing

In relation to enforcing the climate change duties, and other broad statutory duties, there may be issues over standing. To whom are the duties owed and what will an individual or group need to show to establish standing? The considerable relaxation of this hurdle in England and Wales in recent decades suggests that this would not be an issue there,<sup>64</sup> but the comparative dearth of Scottish case-law on title and interest to sue has made it difficult to be certain whether courts would seize on the potential presented by the generous approach shown by past discussion of the *actio popularis* and by cases such as *Wilson v IBA*<sup>65</sup> or (more likely) favour the much narrower view suggested in cases such as the recent decisions of *Forbes v Aberdeenshire Council*<sup>66</sup> and *McGinty v Scottish Ministers*.<sup>67</sup> For environmental cases, the Aarhus Convention<sup>68</sup> could be argued as a lever for forcing a more open approach to the issue of standing.<sup>69</sup> Now, though, the Supreme Court in *AXA General Insurance Ltd v HM Advocate*<sup>70</sup> has given a very clear indication that a broad approach should be adopted in the public law context, based on the party being "directly affected"<sup>71</sup> or having "sufficient interest"<sup>72</sup> rather than having legal title. It remains to be seen, though, how this shift in approach will operate in practice.

### b) Express Exclusion

The courts can be prevented from considering certain cases by express provisions excluding their jurisdiction. The fact that no such exclusion is provided in the UK or Scottish climate change legislation nor in the Child Poverty Act 2010 could be an indication that the courts are intended to have a role. Where judicial intervention is not wanted, it is easy enough for Parliament to say so, e.g. the Fiscal Responsibility Act 2010 stated that the reporting

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<sup>62</sup> Further options, such as "contempt of statute" are discussed but dismissed in P. McMaster, "Climate Change – statutory duty or pious hope?" (2008) 20 JEL 115.

<sup>63</sup> Even where a specific class can be argued as the beneficiaries the courts have been reluctant to recognise statutory duties as creating rights to compensation: *Calveley v Chief Constable of Merseyside* [1989] A.C. 1228; *O'Rourke v Camden Council* [1998] AC 188.

<sup>64</sup> Memorandum from Prof. Christopher Forsyth (CCB 92) to the Joint Committee on the Draft Climate Change Bill (2006-07, HL 170-II/HC 542-II, Ev.238).

<sup>65</sup> *Wilson v IBA* 1979 SC 351.

<sup>66</sup> *Forbes v Aberdeenshire Council* [2010] CSOH 1, [2010] Env. L.R. 36.

<sup>67</sup> *McGinty v Scottish Ministers* [2011] CSOH 163.

<sup>68</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), art.9.

<sup>69</sup> As proposed in the *Report of the Civil Courts Review* (chaired by Lord Gill) (2009) vol.2 pp.28-29.

<sup>70</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, 2011 SLT 1061.

<sup>71</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, 2011 SLT 1061, Lord Hope at [63].

<sup>72</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, 2011 SLT 1061, Lord Reed at [171].

procedures provided in the Act were “[t]he only means of securing accountability in relation to” the duties imposed and that non-compliance with the duties did not affect the lawfulness of anything done or not done.<sup>73</sup> In similar vein, the Irish Climate Change Response Bill that fell when the election there was called in January 2011 provided that the targets and duties it set out “shall not be justiciable”.<sup>74</sup> The absence of such an express exclusion could certainly be taken as indicating that there is intended to be a role for the courts.

#### c) Alternative Remedy

It is not only where they are expressly excluded that the courts will refuse to entertain a case since certain other more general rules<sup>75</sup> also operate to prevent judicial review being sought. The most likely candidate is perhaps the one preventing access to the courts for judicial review when an alternative remedy is available.<sup>76</sup> The climate change legislation does provide detailed requirements to report to Parliament and these are undoubtedly seen as the primary mechanism for enforcement.<sup>77</sup> Yet it is unclear whether these would be regarded as offering a remedy sufficient to displace the standard right to seek judicial redress, especially in view of the emphasis that Ministers are being subjected to legal duties. Again, the contrast with the explicit provisions in the Fiscal Responsibility Act 2010 might be noted. In *Re Neill’s Application for Judicial Review*<sup>78</sup> it was held that the failure to undertake an equality impact assessment could lead to action by the Equality Commission for Northern Ireland was sufficient to exclude legal recourse, but in that case the Commission procedure was expressly created for the enforcement of that specific duty and there was a very clear contrast with adjacent provisions conferring access to the courts to seek damages or an injunction. The reporting procedures in the climate change legislation are clearly designed as the main means of ensuring that the emission reduction targets are met, but it is uncertain whether the courts will view these as the exclusive means.

#### d) Timing of action.

A further complication arises in relation to the timing of any reference to the courts. The outcomes set in the climate change legislation are to be achieved at particular dates. Therefore any breach of the duty can only formally arise when those dates are reached, even though it may be obvious in advance that what is being done is extremely unlikely to secure the required result.<sup>79</sup> Any action brought prior to those dates might be viewed as premature, so long as there remains any possibility of the result being achieved.<sup>80</sup>

There may also be an issue not of prematurity but of lateness. The fact that the emissions targets have been missed will not be immediately apparent but will need to be confirmed through the gathering of the many sources of data that combine to enable to

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<sup>73</sup> Fiscal Responsibility Act 2010, s.4; the Act has been repealed by the Budget Responsibility and National Audit Act 2010.

<sup>74</sup> Climate Change Response Bill 2010 (No.60 of 2010), s.3(2).

<sup>75</sup> There may be a difference between England and Wales and Scotland on whether these are appropriately termed as “rules” or are just aspects of the discretion enjoyed by the courts in handling judicial review cases; *Eba v Advocate General for Scotland* [2011] UKSC 29, 2011 SLT 768 at [27] (Lord Hope).

<sup>76</sup> E.g. *Falconer v South Ayrshire Council* 2002 SLT 1033.

<sup>77</sup> The same applies to the Child Poverty Act 2010.

<sup>78</sup> [2006] NI 278, considering Northern Ireland Act 1998, ss.75, 76 and Sched.9.

<sup>79</sup> Again the analogy with Member States’ duties under EU law may be instructive, where in relation to giving effect to Directives, the duty is to implement the Directive by the due date, and at any time before that it is formally impossible to rule out compliance at the last minute, however unrealistic this may be known to be in view of policy or institutional factors within the state concerned.

<sup>80</sup> “The courts are neither a debating club nor an advisory chamber” *Macnaughton v Macnaughton’s Trustees* 1953 SC 387 at 392 (Lord Justice Clerk Thomson).

creation of the net carbon account.<sup>81</sup> After the due date has passed, would enforcing the duties have any meaning?<sup>82</sup> The specific wording of the climate change duties which give rise to the argument that these are clear “outcome” duties militates against the argument that they are imposing continuing obligations. Any legal action after that stage could be regarded as futile and thus not be entertained by the courts.<sup>83</sup> In contrast, the Child Poverty Act 2010 expressly provides for the continuing effect of the targets after the specified year has passed.<sup>84</sup>

#### e) Justiciability

The label “justiciability” can be given to a rather slippery concept that is basically used to mark out a self-imposed “no-go area” for the courts covering a range of separate considerations that may lead to a court refusing to take a decision on an issue presented to it. Each of these must be considered as a potential hurdle at which an attempt to enforce the climate change duties might fall. The first relates to the categories of governmental activity which the courts are prepared to consider. Although the trend in recent decades has been very firmly away from the earlier approach of recognising certain broad categories, e.g. those based on the prerogative, as being wholly outwith the scope of the courts’ attention,<sup>85</sup> there are undoubtedly some matters that remain unreviewable.<sup>86</sup> For the climate change and child poverty duties, although they may be viewed as embracing an area of high-level government policy, it is hard to see them as falling within the shrinking area of activity automatically removed from the courts’ consideration.

A second consideration relates to the issues already touched on in relation to the content of the duty. The courts are reluctant to get drawn into the determination of policy preferences and arguments over the appropriate allocation of resources. Yet as has been noted, the climate change legislation is different from previous instances by apparently setting a clear and overriding objective for government. The phrasing of an “outcome” duty means that among the various competing claims on government, a legislative formulation has been adopted that marks out one<sup>87</sup> as an outcome that must be achieved, not just a goal towards which endeavours should be directed or consideration be had. The issues which might be seen as more properly the sphere of political rather than judicial accountability<sup>88</sup> have thus already been determined and invoking the courts’ power would therefore be simply a natural consequence of the political decision to embed the greenhouse gas reductions as an absolute legal priority.

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<sup>81</sup> Climate Change Act 2008, s.27; Climate Change (Scotland) Act 2009, s.17.

<sup>82</sup> This is apart from any argument of when “the clock starts ticking” for legal action not to be defeated by the rules on delay, statutory in England and Wales and resting on the doctrine of *mora* in Scotland; *R (Burkett) v Hammersmith and Fulham LBC* [2002] UKHL 23; [2002] 1 WLR 1593.

<sup>83</sup> Cf. *Marco's Leisure Ltd v West Lothian District Licensing Board* 1994 S.L.T. 129, in relation to a licence application for an event scheduled two months before the court hearing took place.

<sup>84</sup> Child Poverty Act 2010, s.17 and Sched.2.

<sup>85</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>86</sup> E.g. the award of honours; *Kerr of Ardgowan v Lord Lyon King of Arms* [2009] CSIH 61, 2010 SC 1.

<sup>87</sup> See below for discussion of where legislation has created more than one such overriding objective, as is the case with the climate change and child poverty targets.

<sup>88</sup> See, for example the criticisms of the role taken by India’s Supreme Court in the evolution of policy; L. Rajamani, “Public Interest Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability” (2007) 19 JEL 293 at 216-319.

Thirdly there are issues of the level of scrutiny to be applied. As the Supreme Court has recently confirmed in the *Cart* and *Eba* litigation in relation to the Upper Tribunal<sup>89</sup> and the *AXA Insurance* case in relation to the Scottish Parliament,<sup>90</sup> not all cases of judicial review involve the same intensity of scrutiny. Here, however, the formulation of an “outcome” duty again simplifies things. The question that the courts have to answer is essentially a pass/fail one – has the outcome been achieved, an outcome that is something that is clearly measurable, rather than involving vaguer expressions, such as the provision of “sufficient” schools?<sup>91</sup> The straightforward nature of the question to be answered is enhanced by the reporting obligations on Ministers and the Climate Change Committee. These reports will reveal authoritatively whether or not the outcome has been achieved,<sup>92</sup> and unless these are themselves challenged, the courts will be relieved of the task of assessing factual compliance.

#### f) Remedies

The final issue in considering judicial enforcement is that of remedies. Here there are two issues, the competence of certain remedies and whether they would be granted even if competent. Starting with the second issue, the English courts have always stressed the discretionary nature of any remedies in judicial review proceedings. Moreover in the specific area of statutory duties it has been said that: “the remedies in public law are discretionary remedies and would not normally be granted if an authority is doing all that it sensibly can to meet an unqualified statutory obligation.”<sup>93</sup> In Scotland the courts have been less clear about the extent of discretion that they enjoy, but clearly are not bound to grant a remedy as of right.<sup>94</sup>

The courts’ decision might be affected by the remedy being sought. If declaratory relief is all that is at stake, then the court simply repeating the finding of compliance or non-compliance with the emissions reduction or child poverty target, a finding that is already obvious and in the public domain as a result of the various reporting procedures, is unlikely to be controversial. If other “outcome” duties were introduced without such an authoritative monitoring and assessment mechanism, the reluctance on the courts to intervene might well be all the greater. If a more concrete remedy is sought, then in addition to the competence issues discussed below, further difficulties will emerge. As discussed above, what makes an “outcome” duty different and more amenable to judicial enforcement than many other statutory duties is its absolute nature – a simple pass/fail test can be applied rather than embarking on balancing competing priorities for governmental intervention and resource

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<sup>89</sup> *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2011] 3 WLR 107; *Eba v Advocate General for Scotland* [2011] UKSC 29, 2011 SLT 768.

<sup>90</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, 2011 SLT 1061.

<sup>91</sup> Note 46, above.

<sup>92</sup> Climate Change Act 2008, ss.20, 36; Climate Change (Scotland) Act 2009, ss.28, 40,41. The Child Poverty Commission does not have such a direct role in reporting; Child Poverty Act 2010, ss.10, 14.

<sup>93</sup> *R v Secretary of State for Education, ex parte Lee* (1987) 54 P&CR 311 at 324 (Mann J). See also Scarman LJ in *R v Bristol Corporation* [1974] 1 W.L.R. 498 at 503: “In my judgment, if, in a situation such as this, there is evidence that a local authority is doing all that it honestly and honourably can to meet the statutory obligation, and that its failure, if there be failure, to meet that obligation arises really out of circumstances over which it has no control, then I would think it would be improper for the court to make an order of mandamus compelling it to do that which either it cannot do or which it can only do at the expense of other persons not before the court who may have equal rights with the applicant and some of whom would certainly have equal moral claims.”

<sup>94</sup> E.g., *King v East Ayrshire Council* 1998 SLT 1287 at 1295; *Ingle v Ingle’s Trustee* 1999 SLT 650 at 654; *Fargie, Petitioner* [2008] CSOH 117, 2008 SLT 949 at 963.

allocation.<sup>95</sup> Yet in proposing a remedy, that is exactly what may be called for. Unless the court is simply going to order achievement of the outcome, merely repeating the statute, some consideration is going to have to be given to the specific steps that must be undertaken to achieve it, embroiling the courts in the very sort of issue that they have traditionally avoided.

In terms of competence it is significant on whom the duties are imposed. In relation to any “outcome” duty placed on a local or statutory authority, no major obstacle arises, but in the Climate Change Acts the duties are imposed on “the Secretary of State” and “the Scottish Ministers”. For declaratory relief there is no difficulty, but these formulations bring into play the arguments over the powers of the courts to grant remedies ordering ministers to do particular things. In England and Wales, since *M v Home Office*<sup>96</sup> it has been clear that in some circumstances at least orders can be made against Ministers. In Scotland the issue has been raised in several significant cases,<sup>97</sup> but the unpredictable course of litigation meant that the expected occasion for this to be at the centre of argument never materialised<sup>98</sup> and there remain uncertainties.

The points discussed in this section reveal something of a paradox. The unqualified nature of the duty neutralises the factors militating against judicial intervention but at the same time they may leave the court with little scope to provide a meaningful remedy in the event of impending or actual non-compliance. The formulation of the duty may render the issue justiciable, by removing the discretion and room for manoeuvre that other types of duty leave for Ministers, but may also constrain the ability of the courts to offer more by way of sanction than a self-evident declaration of non-compliance. The question then arises of whether the climate change duties or other “outcome” duties mean anything more than the “purposive” or “endeavour” duties with which we are familiar.

### Nature of the Duty

As Rubin noted, most legislation nowadays is not laying down “a set of rules for the governance of human conduct” but provides “directives issued by the legislature to government-implementation mechanisms.”<sup>99</sup> The climate change duties are directed at government, not the public, so that their impact should be considered not just in the light of the potential for direct implementation and enforcement in the same way as for private law duties and for the “operational” or “procedural” duties mentioned above. Instead the effect of these and any future “outcome” duties must be looked for elsewhere.<sup>100</sup>

By placing targets in legal form a number of practical things are achieved. In comparison to simple statements of policy, the choice of legislative form allowed for a more formal, longer, and more transparent process for adopting the targets, involving deeper scrutiny. In the case of the 2008 Act this included consideration of a draft Bill by a Joint

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<sup>95</sup> Cf. *Gov't of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); A. Sachs, “Enforcement of Social and Economic Rights” (2006-2007) 22 Am. U. Int'l L. Rev. 673.

<sup>96</sup> [1994] 1 AC 377.

<sup>97</sup> *McDonald v Secretary of State for Scotland (No.1)* 1994 S.C. 234; *Davidson v Scottish Ministers* [2005] UKHL 74, 2006 SC(HL) 41; *Beggs v Scottish Ministers* [2007] UKHL 3, 2007 SLT 235; C. Boyd, “Ministers and the Law” 2006 JR 179.

<sup>98</sup> *Davidson v Scottish Ministers* [2005] UKHL 74, 2006 SC(HL) 41, at [103] (Lord Mance); *Beggs v Scottish Ministers* [2007] UKHL 3, 2007 SLT 235, at [30] (Lord Rodger).

<sup>99</sup> Rubin, “Law and Legislation in the Administrative State” (1989) 89 Colum L Rev 369, 371-372.

<sup>100</sup> Rubin (note 99, above); L. Mader, “Evaluating the Effects: A Contribution to the Quality of Legislation” (2001) 22 Stat LR 119 at 122.

Committee at Westminster, which produced a substantive report of over 80 pages after reflecting on over 420 pages of evidence.<sup>101</sup> The passage of the Climate Change Bills with cross-party support in each Parliament has allowed a sense of wider “ownership” than is the case with any statement made by the Government of the day. The statutory status of the targets also achieves other things, with the legal recognition ensuring that concern for reaching the targets is a relevant consideration in the exercise of functions across government and carries extra weight in the internal arguments for resources.<sup>102</sup>

There is also the symbolic nature of the legislative step. A lot of legislation is enacted not so much for its direct legal impact as for “the message it sends”. This is noticeable in many areas, for example the many new non-regulatory criminal offences created in the past decades which do not genuinely render unlawful for the first time conduct that was previously perfectly lawful, but rather create a new label for offending behaviour in order to highlight its nature.<sup>103</sup> The use of symbolic legislation can be criticised for creating unnecessary laws,<sup>104</sup> for being deceptive<sup>105</sup> or as requiring the law to be applied and interpreted in a special way,<sup>106</sup> but there undoubtedly remains an attraction for governments who see the real importance of such legislation as lying in the visibility given to an issue, rather than any formal sanctions, as the crucial means of influencing behaviour.<sup>107</sup>

Such consequences, though, are largely shared with “purposive” and “endeavour” duties,<sup>108</sup> so that what is different is the weight that an “outcome” duty may carry. As well as the obvious point that requiring the achievement of an objective sends a stronger message to the public than merely presenting it as something that some steps should be taken towards, there are two aspects to be considered. The first is the extent to which the form of an “outcome” duty enhances the status of the objective across government, as an overriding priority, not just a desirable goal. The ambition for far-reaching change was stated by Lord Rooker in the House of Lords during the passage of the Climate Change Act 2008: “Putting a duty such as this into law is important in itself. It is not just about the punishment in the event of failure; it is about trying to change institutional behaviour through a change in the law.”<sup>109</sup>

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<sup>101</sup> Joint Committee on the Draft Climate Change Bill - First Report (2006-07 HL 170-I/HC 542-I).

<sup>102</sup> T. Daintith & A. Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford, OUP, 1999), pp.199-206.

<sup>103</sup> Eg. “vandalism” (introduced by Criminal Justice (Scotland) Act 1980) that covered conduct already criminal as malicious mischief, and all the aggravated assaults that merely add more refined labels to what was already covered by the general offences.

<sup>104</sup> See the debates over the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill introduced to the Scottish Parliament in June 2011 (SP Bill 1).

<sup>105</sup> A. Siehr, “Symbolic Legislation and the Need for Legislative Jurisprudence: The Example of the Federal Republic of Germany” (2008) 2 *Legisprudence* 271.

<sup>106</sup> J.P. Dwyer, “The Pathology of Symbolic Legislation” (1990) 17 *Ecology LQ* 233. Note though that from this distance the climate change and child poverty targets are achievable (albeit perhaps with great difficulty) whereas the symbolic legislation discussed by Dwyer required something that was in practical terms always unrealistic.

<sup>107</sup> A more cynical view notes the additional political value in demonstrating that “something is being done” by the government about a problem of public concern.

<sup>108</sup> See note 36, above.

<sup>109</sup> HL Hansard vol.696 col.1209, 12 November, 2007.

The role of legislation in achieving such a pervasive change of attitude and behaviour has been subject to considerable scrutiny in the context of sustainable development.<sup>110</sup> The mismatch has been noted between the limited progress towards more sustainable ways of living and the strong policy commitments to sustainable development made since the Rio Summit in 1992: “The United Kingdom is determined to make sustainable development the touchstone of its policies.”<sup>111</sup> Different approaches have been considered, including what are described here as “operational”, “relationship”,<sup>112</sup> “purposive” and “endeavour” duties, with authors concluding that there is a real value in embedding concerns in legislation rather than mere policy, but also that it must be given clear priority as an objective of government, as well as being supported by appropriate monitoring and reporting mechanisms.<sup>113</sup> An “outcome” duty may not be appropriate for a multi-faceted goal such as sustainability where no simple pass/fail test can be applied, but where such a goal can be identified, as for greenhouse gas emissions or for anti-poverty measures based on the number of households in specific income groups,<sup>114</sup> there is potential to establish a dominant priority across government.

There is a danger, though, that competing priorities appear. Already there are binding targets for both climate change and child poverty but it is unclear how meeting either of these should rank against other duties. So much discretion is conferred on how the climate and poverty targets are to be reached that in most circumstances it should be possible to reconcile the conflicting demands on Ministers and others, but if there is a clash, then an “outcome” duty surely should have precedence over duties expressed in weaker terms, e.g. the duty to “have regard, so far as consistent with the proper exercise of [its] functions to the purpose of conserving biodiversity”.<sup>115</sup> Nevertheless there may be clashes between “outcome” duties themselves and between these and other strong duties, e.g. to ensure compliance with EU law and the European Convention on Human Rights. In such cases, a hierarchy may have to be established, based perhaps on views that the “constitutional” statutes take priority over others,<sup>116</sup> and between the different “outcome” duties perhaps reverting to traditional reliance on chronology and implied repeal, so that an earlier duty is read as being qualified by the greater priority given to a later one. Alternatively, the problem of conflicts between supposedly absolute duties could be viewed as a further argument for not taking “outcome” duties at face value and interpreting them as requiring merely reasonable endeavours towards their achievement.

The issue of hierarchy leads on to the second aspect to be considered, the extent to which the use of an “outcome” duty is an attempt to entrench the policy objective and to secure its priority so as to bind future governments. Again this is an issue explored in relation to sustainable development. Although even embedding the emissions targets in

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<sup>110</sup> V. Jenkins, “Placing Sustainable Development at the Heart of Government: the role of law in the evolution of sustainable development as the central organising principle of government” (2002) 22 Leg.St. 578; S. Cussons, *Reviewing Statutory Sustainable Development Duties* (2006, IHPC, London); A. Ross, “Why Legislate for Sustainable Development?” (2008) 20 JEL 35; A. Ross, *Sustainable Development Law in the UK – from Rhetoric to Reality?* (Earthscan, 2011).

<sup>111</sup> Introduction by Rt. Hon. John Gummer, Secretary of State for the Environment, to *Sustainable Development: The UK Strategy* (Cm 2426, 1994), p.5.

<sup>112</sup> In the context of establishing the status of plans and strategies.

<sup>113</sup> A. Ross, *Sustainable Development Law in the UK – from Rhetoric to Reality?* (Earthscan, 2011), chaps 13 and 14.

<sup>114</sup> As in the targets in the Child Poverty Act 2010.

<sup>115</sup> Natural Environment and Rural Communities Act 2006, s.40(1).

<sup>116</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] Q.B. 151.



statute does not mean that they are completely guaranteed as enduring commitments – parliamentary sovereignty, after all, means that the Acts could be amended or repealed, quite apart from the limited flexibility expressly provided for<sup>117</sup> – as provisions in primary legislation they are clearly harder to change than mere policy commitments. The simple effort and formality involved in changing the law, as opposed to policy, will make any departure from the targets a much less inviting task for future governments, quite apart from the impact of the public debate that accompanies the legislative process and will highlight the abandonment of the previous targets.<sup>118</sup> The absence of qualifying words or competing interests to pursue also protects the priority of the objective from being legitimately eroded by other concerns as time passes and circumstances change.

At its extreme, this has led to claims that the Climate Change Act has “constitutional significance”.<sup>119</sup> This claim is examined by McHarg,<sup>120</sup> who concludes that “as a pre-commitment strategy designed to promote the long-term public interest ... by constraining short-term political and economic imperatives, the [Climate Change Act 2008] can reasonably be described as a constitutional measure.”<sup>121</sup> Yet she also notes that, apart from questions over the appropriateness of this specific response to the climate change problem, there is an argument that the attempt to bind future generations is undemocratic. Climate change may be a unique challenge, where the intra-generational dimension is exceptionally strong,<sup>122</sup> but the question of the legitimacy of pre-commitment is an issue for any “outcome” duty that aims beyond the immediate future.

In considering what other goals might be viewed as appropriate for the use of “outcome” duties, it is interesting to note different approaches in the measures taken by the current and previous governments in relation to other long-term undertakings, agreed (if not in full detail) across the political parties as goals that governments need to achieve. As has been noted, in relation to reducing child poverty, an “outcome” duty in relation to the 2020 target was enacted in the Child Poverty Act 2010 and remains in place,<sup>123</sup> but accompanied by a lesser reporting duty in relation to 2010 and subsequent years.<sup>124</sup> In relation to the reduction of public sector borrowing, the Labour government again chose a legislative approach by means of the Fiscal Responsibility Act 2010, at the heart of which lies a series of “outcome” duties, setting targets to be achieved by certain dates. For example:

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<sup>117</sup> Climate Change Act 2008, s.2; Climate Change (Scotland) Act 2009, s.2. This flexibility has already been used to raise the interim target in the 2008 Act; Climate Change Act 2008 (2020 Target, Credit Limit and Definitions) Order 2009, SI 2009/1258. There is no explicit power to alter the targets in the Child Poverty Act 2010, but the power to define some of the crucial terms used in assessing the position (s.7) could have the effect of altering what must be achieved.

<sup>118</sup> Although this could work the other way; as meeting the targets becomes more demanding, it may be harder for a government to resist in Parliament a populist call for amending the statute that sets the targets than would be the case if the targets were less exposed through being part of a complex mesh of environmental and social policies that the government was committed to support.

<sup>119</sup> Lord Rooker in the House of Lords during the passage of the Bill; HL Deb vol.696 col.1209 (27 Nov. 2007).

<sup>120</sup> A. McHarg, “Climate Change Constitutionalism? Lessons from the United Kingdom” (2011) 2 *Climate Law* 1.

<sup>121</sup> McHarg (note 120, above), p.15.

<sup>122</sup> R.J. Lazarus, “Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future”(2008-09) 94 *Cornell L Rev* 1154.

<sup>123</sup> Child Poverty Act 2010, s.2.

<sup>124</sup> Child Poverty Act 2010, s.1. Like the Climate Change Acts this Act creates a reporting and advisory body, the Child Poverty Commission, and imposes strict requirements to report to Parliament on progress towards the targets.

The Treasury must ensure that, for the financial year ending in 2014, public sector net borrowing expressed as a percentage of gross domestic product is no more than half of what it was for the financial year ending in 2010.<sup>125</sup> In this Act judicial enforcement was expressly precluded,<sup>126</sup> but the use of the “outcome” duties was notable.

Since then, though, the new coalition government has reverted to a more traditional approach, repealing the 2010 Act and replacing it with the Budget Responsibility and National Audit Act 2011. This avoids creating legal targets, but establishes a Charter for Budget Responsibility to be overseen by the Office for Budget Responsibility. Like the Committee on Climate Change established under the climate change legislation, this Office has to produce reports to Parliament as the main way of ensuring progress toward the stated goals, but the goals themselves are not given direct legal status. The volatility of government finances in a very uncertain international economic context and the centrality of finance to everything that a government does, and hence the desire for greater room to manoeuvre, may by themselves distinguish this situation from climate change. Or perhaps the view has been taken to eschew legally binding targets so that the climate change and child poverty duties will remain as the sole examples of a new sort of statutory duty, short-lived as a legislative technique but with an impact enduring until 2050 at least.<sup>127</sup>

## Conclusion

This paper has presented an argument that the Climate Change and Child Poverty Acts can be taken at face value as creating a new form of statutory duty, representing a legal innovation through the imposition of unqualified legal duties on Ministers to achieve certain outcomes which can be met only as the result of a complex aggregation of legislation, decisions, actions and public spending over an extended period. If the phrasing of these duties is to be taken seriously and their legal status is to be substantial rather than symbolic, then one might expect that they should be amenable to some form of enforcement through the courts. Although the very features that suggest that the Acts do create specific legal duties that can be enforced also serve to strip away some of the arguments used to avoid the courts’ judging government on its policy choices (as opposed to how it is doing things), other hurdles may stand in the way of effective judicial intervention.<sup>128</sup> Nevertheless the statutory status of the emissions targets has consequences in practical politics and in law, consequences enhanced by the use of “outcome” duties as opposed to the formulations we are more accustomed to. The potential for such duties in relation to less clearly measurable outcomes may be questioned, as may the legitimacy of the use of such duties to pre-determine policy for future generations. Accordingly, the Climate Change Acts may survive as a one-off response to a problem that is exceptional in its scale and time-frame, with child poverty as the only other area where the technique is used. Nevertheless, the use of “outcome” duties does create a precedent, albeit one whose meaning is not wholly clear and that raises a number of issues demanding more thorough examination before the precedent is more widely used.

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<sup>125</sup> Fiscal Responsibility Act 2010, s.1(2).

<sup>126</sup> Fiscal Responsibility Act 2010, s.4.

<sup>127</sup> It is worth remembering that by the time the main emission targets have to be met in 2050, forty years away, the relationship between the courts and government may be very different from what it is today - forty years ago we had not even reached *Laker Airways*, far less *GCHQ*, in terms of the reviewability of powers under the prerogative; *Laker Airways Ltd. v Department of Trade* [1977] Q.B. 643; *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374.

<sup>128</sup> Nonetheless, given the uncertainty over the impact of the legal duties, the best practical advice may be to try to avoid being the relevant Minister at the key dates.